Abdul Rahman bin Ibrahim v Pengarah Besar Lembaga Kemajuan Tanah Persekutuan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1273 OF 2006
RAUS SHARIF, HASAN LAH AND SULONG MATJERAIE JJCA
7 JANUARY 2010

Labour Law — Employment — Termination — Confirmed and pensionable employee of FELDA — Whether services could be terminated by way of reg 48 of the Land Development (Conditions of Services of Officers and Servants) Regulations 1970 — Whether termination must be by way of dismissal as provided by reg 35 — Whether FELDA failed to follow proper procedure

The plaintiff, an employee of the defendant ('FELDA') was confirmed in his post as a clerk and was subsequently placed under a pensionable scheme. During his service at Bahagian Pentadbiran, Pejabat FELDA Batu Lapan, Guar Napai Changloon, Jitra, Kedah Darul Aman, upon finding some irregularities on the accounts he was charged of, he was asked to make good of the shortfall. The plaintiff did after some hesitations. However, by a letter dated 28 April 1993, FELDA terminated the plaintiff's services under reg 48(a) of the Land Development (Conditions of Services of Officers and Servants) Regulations 1970 and paid him three months' salary in lieu of notice. Subsequently, the plaintiff filed a civil suit against FELDA claiming general damages, arrears of salary, allowances and other payments including pension benefits. The issue for determination at the High Court in essence was, whether the plaintiff's services can be terminated by way of reg 48 notwithstanding that he was a confirmed and pensionable employee. The plaintiff's submission was that reg 48 could not be used against him as he was a confirmed and pensionable employee, and the applicable law was reg 35 of Regulations 1970. On the other hand, FELDA submitted that reg 48 conferred FELDA the power to terminate the services of the plaintiff, notwithstanding that he was a confirmed and pensionable employee.

Held, allowing the appeal with costs here and below:

(1) The law had always recognised a distinction between a probation or contract employee from a confirmed or a permanent employee. Hence, the services of the plaintiff could not be terminated by way of reg 48. In the present case, the plaintiff, being a confirmed and permanent employee, the correct procedure for terminating the plaintiff's services must be by way of dismissal as provided by reg 35 (see para 11).

(2) The plaintiff had made a representation to FELDA to exculpate himself of the charges by explaining the circumstances as to the irregularities to the accounts and the reason for the delay in making good the shortfall. It was incumbent for the chairman after receiving the representation to consider whether the conduct of the plaintiff would warrant a dismissal or reduction in rank. However, in the present case, FELDA had clearly failed to follow the proper procedure as laid down by reg 35. This amounted to procedural unfairness resulting in the plaintiff being deprived of right to be heard and, as there was procedural unfairness, FELDA's action could not be supported for it was bad in law. Therefore the termination could not be upheld (see paras 13–14).

(3) Moreover, to accede to FELDA's submission would lead to absurdity where FELDA would be at liberty to resort to reg 48 for termination, by which way FELDA would be absolved from paying the pension and other retirement benefits. That could not be the position of the law (see para 15).

[Bahasa Malaysia summary

Plaintif, seorang pekerja defendan ('FELDA') yang telah disahkan jawatannya sebagai seorang kerani dan kemudiannya diletakkan di bawah skim pencen. Semasa perkhidmatannya di Bahagian Pentadbiran, Pejabat FELDA Batu Lapan, Guar Napai Changloon, Jitra, Kedah Darul Aman, apabila menemui beberapa kejanggalan pada akaun di mana dia telah dituduh, dia diminta membayar kekurangan tersebut. Dengan berat hati, plaintif membayar kekurangan tersebut. Walau bagaimanapun, melalui surat bertarikh 28 April 1993, FELDA menamatkan perkhidmatan plaintif di bawah peraturan 48(a) Peraturan-Peraturan Kemajuan Tanah (Syarat-syarat Perkhidmatan bagi Pegawai-pegawai dan Penjawat-penjawat) 1970 dan sebagai ganti notis membayarnya wang sejumlah tiga bulan gajinya. Kemudiannya, plaintif memfailkan satu tindakan guaman sivil terhadap FELDA menuntut ganti rugi am, tunggakan gaji, elaun-elaun dan bayaran lain termasuk faedah persaraan. Isu untuk diputuskan di Mahkamah Tinggi dalam intipatinya adalah, sama ada perkhidmatan plaintif boleh ditamatkan mengikut peraturan 48 walaupun dia adalah seorang pekerja yang disahkan jawatannya dan berpencen. Hujahan plaintif adalah peraturan 48 tidak boleh digunapakai terhadapnya kerana dia ialah seorang pekerja yang disahkan jawatannya dan berpencen, dan peruntukan undang-undang yang terpakai adalah peraturan 35 Peraturan-Peraturan 1970. Sebaliknya, FELDA menghujahkan bahawa peraturan 48 mengkurniakan FELDA kuasa untuk menamatkan perkhidmatan plaintif, walaupun dia seorang pekerja yang disahkan jawatannya dan berpencen.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Undang-undang sentiasa mengiktiraf perbezaan antara pekerja dalam

A percubaan atau kontrak dengan pekerja yang disahkan dalam jawatannya atau pekerja tetap. Maka, perkhidmatan plaintif tidak boleh ditamatkan mengikut peraturan 48. Dalam kes ini, plaintif, adalah seorang pekerja yang disahkan dan tetap, maka prosedur yang betul untuk menamatkan perkhidmatan plaintif mestilah melalui cara
B pemecatan yang diperuntukkan oleh peraturan 35 (lihat perenggan 11).

(2) Plaintif telah membuat satu representasi kepada FELDA untuk membebaskan dirinya daripada tuduhan-tuduhan dengan menjelaskan keadaan-keadaan berkaitan dengan kejanggalan akaun-akaun dan sebab
C bagi kelewatan dalam membuat bayaran terhadap kurangan tersebut. Adalah wajib untuk pengerusi selepas menerima representasi tersebut untuk menimbangkan sama ada kelakuan plaintif mewajarkan satu pemecatan atau penurunan pangkat. Walau bagaimanapun, dalam kes ini, FELDA dengan jelas telah gagal untuk mengikut prosedur yang sah
D sebagaimana ditetapkan oleh peraturan 35. Ini merupakan ketidakadilan bertatacara yang mengakibatkan plaintif dirampas hak untuk didengar dan, oleh kerana wujudnya ketidakadilan bertatacara, tindakan FELDA tidak boleh disokong kerana ianya salah di sisi undang-undang. Lantaran itu penamatan tersebut tidak boleh
E dipertahankan (lihat perenggan 13–14).

(3) Untuk menerima hujahan FELDA akan mendorong kepada ketidakmunasabahan di mana FELDA akan bebas untuk menggunakan peraturan 48 untuk penamatan, di mana FELDA tidak perlu untuk
F membayar pencen dan faedah persaraan lain. Bukan itu yang dimaksudkan oleh undang-undang (lihat perenggan 15).]

Notes

For cases on termination, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue)
G paras 1198–1204.

Cases referred to

Abd Rauf Alip v Suruhanjaya Pasukan Polis & Anor [2003] 1 CLJ 1, CA (refd)

H *Government of Malaysia v Lionel* [1974] 1 MLJ 3, PC (refd)

Mohd Najib bin Hj Ahmad v Lembaga Padi dan Beras Negara [1998] 4 MLJ 425; [1998] 4 CLJ 405, CA (refd)

Zakiah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan [2005] 6 MLJ 517; [2005] 5 AMR 697, CA (refd)

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Legislation referred to

Land Development (Conditions of Services of Officers and Servants) Regulations 1970 regs 35, 35(ii), 48, 48(a)

Rules of the High Court 1980 O 14A

Appeal from: Civil Suit No S2(S9)(S4)–24–789 of 1994 (High Court, Kuala Lumpur)

Haniff Khatri (Haniff Khatri) for the appellant.
J Doshi (Abdullah & Zainuddin) for the respondent.

Raus Sharif JCA (delivering judgment of the court):

[1] This appeal came before us on 30 June 2009. We were then informed that the grounds of judgment of the learned trial judge was not available. We voiced out our concern as it is an old case which was filed in the High Court in 1994. Parties then agreed that the appeal can be heard without the grounds of judgment.

[2] After hearing the parties we allowed the appeal. We now give our reasons. For convenience, we will call the appellant 'the plaintiff' and the respondent 'the defendant' or 'FELDA' in this judgment.

[3] The brief facts of the case are these. The plaintiff was the employee of the defendant, Pengarah Besar Lembaga Kemajuan Tanah Persekutuan ('FELDA'). He joined FELDA on 9 May 1974 as a clerk and was confirmed in his post on 2 July 1978. Thereafter, by a letter dated 27 August 1984, he was placed under a pensionable scheme.

[4] Sometime in 1993 while the plaintiff was serving at Bahagian Pentadbiran, Pejabat FELDA Batu Lapan, Guar Napai Changloon, Jitra, Kedah Darul Aman it was found that there were some irregularities on the accounts that he was in charge of. There was a shortfall and he was asked to make good of the shortfall. This, he did after some hesitations.

[5] Unfortunately for the plaintiff, it did not save his job. By a letter dated 28 April 1993, FELDA terminated the plaintiff's services by paying him three months salary in lieu of notice. His service was terminated under reg 48(a) of the Land Development (Conditions of Services of Officers and Servants) Regulations 1970 ('Regulations').

[6] On 4 October 1994, the plaintiff filed a civil suit against FELDA at the High Court in Kuala Lumpur vide (S6)(S4)24–78a of 1994, claiming general damages, arrears of salary, allowances and other payments including pension benefits.

A **[7]** At the High Court, pursuant to an application under O 14A of the Rules of the High Court 1980 the following two questions of law were posed to the learned High Court judge to decide:

(1) Adakah penamatan perkhidmatan kerja plaintif oleh defendan berpandu kepada Kaedah 48 atau Kaedah 35 Land Development (Condition of Services of Officers and Servants) Regulation 1970: DAN

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(2) Sama ada defendan boleh menggunakan Kaedah 48 Regulation 1975 untuk menamatkan perkhidmatan plaintif, atau sama ada defendan adalah terikat dengan Kaedah 35 Regulation 1970 dalam setiap hal dan keadaan kes ini.

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[8] In essence, what the court was called to decide upon was whether the plaintiff's services can be terminated by way of reg 48 notwithstanding that he was a confirmed and pensionable employee.

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[9] Before us, En Haniff Khatri, learned counsel for the plaintiff submitted that reg 48 cannot be used against the plaintiff. This is because the plaintiff was a confirmed and pensionable employee. According to him, for a confirmed and pensionable employee like the plaintiff, the applicable law is reg 35 of Regulations 1970. Learned counsel for FELDA, Puan Doshi, on the other hand submitted that reg 48 conferred FELDA the power to terminate the services of the plaintiff, notwithstanding that he was a confirmed and pensionable employee.

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F **[10]** In order to understand their arguments and for ease of reference, the respective regs 35 and 48 are hereby reproduced:

35 Where it is represented to the Chairman by the General Manager or is found by the Chairman that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Chairman, merits dismissal or reduction in rank, the following provisions shall apply:

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(i) The Chairman shall after considering all the available information in his possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days a representation containing grounds upon which he relies to exculpate himself.

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(ii) If after considering the said representation furnished by the officer the Chairman is of the opinion that the unsatisfactory work or conduct of the officer is not so serious enough to warrant dismissal or reduction in rank, the Chairman may impose upon the officer such lesser punishment as he may deem fit.

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(iii) If the officer does not furnish any representation within the time fixed, or if he furnished a representation which fails to exculpate himself to the

satisfaction of the Chairman, the Chairman shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(iv) Where the Chairman considers that the case against the officer requires further clarification he may appoint a Committee of Inquiry consisting of not less than two senior officers of the Authority who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry shall not be selected to be a member of the Committee.

(v) The officer shall be informed of the date at which the complaint against him shall be enquired into; and on such date he shall be entitled to appear before the Committee for the purpose of exculpating himself.

(vi) If witnesses are examined by the Committee, the officer shall be given an opportunity to question the witnesses.

(vii) The Committee, after such inquiry, shall make a report to the Chairman through the General Manager.

(viii) If, upon considering the report of the Committee, the Chairman is of the opinion —

(a) that the officer should be dismissed or reduced in rank, he shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, he may inflict upon the officer such lesser punishment as he may deem fit.

48 Notwithstanding the foregoing regulations the Authority may at any time terminate the employment of any officer without any reason being assigned on giving the officers:

(a) in the case of an officer not on probation and drawing an inclusive salary of RM850.00 per month and above, three months notice in writing or on paying him three months inclusive salary at the rate then payable in lieu of notice.

(b) in the case of an officer on probation or drawing an inclusive salary of less than RM850.00 per month, one month's notice in wring or one month's salary at the rate then payable in lieu of notice.

[11] We are of the view that the services of the plaintiff cannot be terminated by way of reg 48. This is because the law has always recognised a distinction between a probation or contract employee from a confirmed or a permanent employee (see *Zakiah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517; [2005] 5 AMR 697, *Abd Rauf Alip v Suruhanjaya Pasukan Polis & Anor* [2003] 1 CLJ 1 and *Government of Malaysia v Lionel* [1974] 1 MLJ 3). In the present case, it is not in dispute

that the plaintiff was a confirmed and pensionable employee. Thus, the correct procedure for terminating the services of the plaintiff must be by way of dismissal as provided by reg 35.

[12] Our view is fortified by the action taken by FELDA in this case. FELDA on 17 March 1993 had issued a show cause letter against the plaintiff (p 138 of the appeal record). In the show cause letter, three charges were preferred against the plaintiff which were as follows:

(i) Secara sengaja telah mengambil wang tunai dari peti besi rancangan Felda Guar Napai/Batu Lapan sebanyak RM1,464.00 untuk kepentingan peribadi.

(ii) Menyimpan wang Felda RM1,464.00 dalam tempoh melebihi 1 bulan dan wang berkenaan berada di tangan tuan walaupun telah pun bertukar ke rancangan Felda Bukit Tajau mulai 22 Februari, 1993. Wang tersebut hanya diserahkan pada 8 Mac, 1993 setelah didesak oleh Pengurus.

(iii) Tuan telah membuat catatan palsu di rekod Kenyataan Aliran Wang pada 3 Februari 1993 dengan merekodkan urusan bayaran PH sebanyak RM1,464.00, padahal urusniaga tersebut tidak dilaksanakan dan tanpa dokumen sokongan yang perlu. Wang tersebut tuan ambil dan gunakan untuk urusan peribadi.

[13] By a letter dated 23 March 1993, the plaintiff explained the circumstances as to the irregularities to the accounts. He also explained the reason for the delay in making good the shortfall. In effect, the plaintiff had made a representation to FELDA to exculpate himself of the charges.

[14] Under reg 35(ii) it is incumbent for the chairman after receiving the representation to consider whether the conduct of the plaintiff would warrant a dismissal or reduction in rank. If the chairman is of the opinion the conduct of the plaintiff is not serious enough, the chairman may impose on the plaintiff such lesser punishment as he may deem fit. However, if this fails to exculpate the plaintiff to the satisfaction of the chairman, the chairman has to proceed and consider and decide on the dismissal or reduction of rank of the plaintiff. But none of these was done. Instead, FELDA took a short cut by terminating the plaintiff's service by resorting to reg 48. Clearly, FELDA had failed to follow the proper procedure as laid down by reg 35. It amounts to procedural unfairness resulting the plaintiff being deprived his right to be heard. As there was procedural unfairness, it follows that FELDA's action cannot be supported as this is bad in law. The termination cannot be upheld (see *Mohd Najib bin Hj Ahmad v Lembaga Padi dan Beras Negara* [1998] 4 MLJ 425; [1998] 4 CLJ 405).

[15] Moreover, to accede to the FELDA's submission will lead to absurdity. It will lead to a situation where FELDA is at liberty to resort to reg 48 to terminate all his officers or employees, notwithstanding they are confirmed or permanent employee. In that way, FELDA will be free of the burden of paying their pension and other retirement benefits to its officers or employees. That cannot be the position of the law.

[16] It was for above reasons that we allowed the plaintiff's appeal. We therefore set aside the High Court order. We granted the plaintiff's prayers as sought in the statement of claim which are as follows:

(a) a declaration that the plaintiff's termination was null and void;

(b) the plaintiff is entitled to arrears of salaries, emolument and other benefits as provided under the contract of employment;

(c) the plaintiff is entitled to be paid pension;

(d) all sum due to the plaintiff shall carry 8% interest; and

(e) costs here and at the court below. For costs before us and after hearing the parties we fixed it at RM5,000.

[17] We also made an order that the case be sent back to the High Court for the senior assistant registrar to make the appropriate assessment in respect of the claims allowed in this appeal. Deposit to be refunded to the plaintiff.

Appeal allowed with costs.

Reported by Mashrifah Ravendran